FILE COPY

No. 675

In the Supreme Court of the United States

OCTOBER TERM, 1932

GEORGE MOORE ICE CREAM COMPANY, INC.,
PETITIONER

v.

J. T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 13–17) is not reported. The opinion of the Circuit Court of Appeals (R. 22–27) is reported in 61 F. (2d) 605.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 9, 1932 (R. 27). A petition for rehearing was denied December 20, 1932 (R. 29). Petition for a writ of certiorari was filed February 9, 1933, and granted March 20, 1933

(R. 29). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether income taxes paid voluntarily prior to the amendment of Section 3226 of the Revised Statutes by Section 1014(a) of the Revenue Act of 1924 may be recovered in a suit brought after such amendment against the Collector to whom the taxes were paid.

A further question, discussed in Point II, *infra*, is whether the amendment of the claim for refund was valid.

STATUTES INVOLVED

These are set forth in the Appendix, pp. 27–28, *infra*.

STATEMENT

On March 28, 1931, the petitioner, a Georgia corporation, brought suit in the District Court against the respondent, a Collector of Internal Revenue, to recover the principal sum of $4,551.01, being part of an amount of $6,871.18 assessed against the petitioner in November, 1921 as a deficiency in its income and profits taxes for 1917 (R. 1–5).

The petitioner's amended petition in the District Court alleged that on April 1, 1918, it filed its income-tax return for 1917, said return disclosing no tax liability (R. 2); that thereafter the Commissioner of Internal Revenue audited the return and determined that petitioner had a taxable net in-

come of $16,040.18 for 1917, that its average invested capital for 1917 was $28,416.30, and that its tax liability for 1917 was $6,871.18 (R. 2); that on November 5, 1923, petitioner paid to the respondent "upon compulsion and duress" the sum of $6,874 (R. 2–3); that the collection of said sum of $6,874 was illegal for the reason that it "was computed upon an incorrect income and invested capital"; that petitoner's correct taxable income for 1917 was $9,546.35; that its correct average invested capital for 1917 was $27,823.40, and that its correct tax liability for 1917 was $2,322.99; that petitioner is lawfully entitled to a refund of $4,551.01 (R. 4).

The amended petition further alleged that on November 5, 1927, petitioner filed a claim for refund (R. 3). A copy of this claim was attached to the amended petition (Exh. A; R. 5–11). The claim was predicated upon (1) an alleged error of the Commissioner in computing "the variable deduction for excess profits" (R. 8–9), (2) a claim for special assessment (R. 9–10), and (3) "Apparent Errors in Adjustments in Invested Capital * * * and in Net Income for 1917" (R. 10–11). Under this last heading the claim alleged that the agent was in error in eliminating certain specified items from petitioner's invested capital, "and that these amounts should be restored to Invested Capital, an audit is now being made of taxpayers' books to determine the correctness of these adjustments as well as the adjustments made in

Net Income for the year 1917. * * * If the audit now being made reflects a difference result it will be submitted as additional evidence" (R. 10–11).

The amended petition further alleged that on November 13, 1928, and January 2, 1929, detailed statements showing all the items entering into and making up net income and invested capital were filed with the Commissioner, said statements being under oath and intended as amendments to the claim [1]; that the Commissioner accepted the claim without objecting to it as insufficient in form; that said claim, together with the supplemental data above mentioned, was referred by the Commissioner to the Internal Revenue Agent in Charge at Atlanta, who, after examination, determined that petitioner was entitled to a refund of $4,551.01, said refund being based upon a corrected tax liability of $2,322.98; and that thereafter, on September 18, 1929, the Commissioner rejected the claim for refund in full (R. 3).

It would appear from the opinion of the District Court (R. 15), *but not from the record otherwise,* that the amended petition was further amended so as, apparently, to show that by the amendments of January 2, 1929, to the claim for refund several specified items were listed as having been erroneously included by the Commissioner in petitioner's net income for 1917.

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[1] The amendments to the claim referred to in the amended petition are not in the record; but see R. 19–20.

To the amended petition the Collector demurred, generally and specially [2] (R. 11–13). The District Court did not pass upon the special demurrers but sustained the general demurrer on two grounds: (1) that the tax was paid without protest, and (2) that the amended petition was based upon a ground not specified in the claim for refund, that such ground was not an amendment of the claim for refund but was an original claim, and as such was filed too late (R. 13–17). Upon appeal the Circuit Court of Appeals seems to have been of the view that the tax was not recoverable because it was not paid under protest (R. 25), but it did not decide this question, and sustained the judgment of the District Court on the ground that the amended petition was based upon a ground "wholly different from the one stated in his [the] claim for refund" (R. 22–27).

SUMMARY OF ARGUMENT

The petitioner concedes that its amended petition states no cause of action against the respondent unless Section 1014(a) of the Revenue Act of 1924, which amended Section 3226, R.S., so as to provide that suit for the recovery of a tax illegally collected might be maintained "whether or not such tax * * * has been paid under protest

[2] The demurrer (R. 11–13) was apparently filed prior to the "amendment" to the amended petition which appears only in the opinion of the District Court (R. 15).

or duress ", applies retroactively to taxes paid and transactions completed prior to its effective date. Section 1014(a) is not specifically made applicable to taxes paid prior to its enactment, and such a construction of the section is not necessarily implied. This Court has repeatedly held that a statute shall not be given a retroactive application unless such effect is required by explicit language or necessary implication. Particularly is this true where to give a statute retroactive application would injuriously affect substantive rights or rights of action previously vested. Moreover, a retroactive application of Section 1014 would give rise to serious doubts as to its constitutionality since, so construed, its effect would be to impose a personal liability upon the respondent for an act which gave rise to no liability at the time of the act.

ARGUMENT

I

THE TAX SUED FOR CANNOT BE RECOVERED SINCE IT WAS PAID VOLUNTARILY PRIOR TO THE ENACTMENT OF THE REVENUE ACT OF 1924

The tax in question was paid voluntarily and without protest on November 5, 1923[3] (R. 3). Prior to the enactment of the Revenue Act of 1924 it was the settled rule that there could be no re-

[3] While the petitioner's amended petition in the District Court alleged that the tax was paid "upon compulsion and duress" (R. 3), this allegation has apparently been

covery of a tax erroneously paid or illegally exacted unless it had been paid under protest. This was true whether the suit was against the United States[4] or against a Collector. *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488; *Chesebrough* v. *United States*, 192 U.S. 253; *Swift Co.* v. *United States*, 111 U.S. 22; *Wright* v. *Blakeslee*, 101 U.S. 174, 179; *Philadelphia* v. *Collector*, 5 Wall. 720, 731–732; *Elliott* v. *Swartwout*, 10 Pet. 137, 152–153; *Fox* v. *Edwards*, 287 Fed. 669 (C.C.A. 2d); *Coffey* v. *Exchange Bank*, 296 Fed. 807 (C.C.A. 8th); *John B. Semple & Co.* v. *Lewellyn*, 1 F. (2d) 745, 748 (W.D. Pa.), affirmed, 10 F. (2d) 1023 (C.C.A. 3d); *White* v. *Hopkins*, 51 F. (2d) 159, 161 (C.C.A. 5th). Cf. *United States* v. *P. Lorillard Co.*, 267 U.S. 471, 474; *Atchison, T. & S.F.R. Co.* v. *O'Connor*, 223 U.S. 280.

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treated by the parties as being a mere conclusion of law and not as establishing that the payment was under protest. See *United States* v. *Cuba Mail S.S. Co.*, 200 U.S. 488, 494; *Little* v. *Bowers*, 134 U.S. 547, 555. The petitioner concedes in its petition for certiorari (p. 9) and apparently in its brief on the merits (pp. 4–5) that prior to the enactment of the Revenue Act of 1924 it would not have had a cause of action against the Collector. Cf. *Burnet* v. *Chicago Railway Equipment Company*, 282 U.S. 295, 303. Both courts below proceeded upon the assumption that the tax was paid voluntarily (R. 15–16; 25–26).

[4] Except, of course, where *by statute* recovery against the United States has been permitted without the necessity of protest. See *United States* v. *Hvoslef*, 237 U.S. 1, 12; *Rand* v. *United States*, 249 U.S. 503, 508; *Fox* v. *Edwards*, 287 Fed. 669 (C.C.A. 2d); *Coffey* v. *Exchange Bank*, 296 Fed. 807, 809, 811 (C.C.A. 8th). And cf. *Hyatt Roller Bearing Company* v. *United States*, 43 F. (2d) 1008 (C.Cls.).

In 1924 Section 3226 of the Revised Statutes, which sets forth the requisites for a suit or proceeding in a court to recover taxes illegally assessed or collected, was amended by Section 1014(a) of the Revenue Act of 1924, ch. 234, 43 Stat. 253, p. 28, *infra,* by the insertion of the following proviso:

> but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.

Section 1014(a) of the 1924 Act was reenacted as Section 1113 of the Revenue Act of 1926, ch. 27, 44 Stat. 9, and is still in force.[5] (U.S.C.App., Title 26, Sec. 156.)

The petitioner concedes that (Pet. p. 9)

> Without the amendment to Section 3226 R.S. * * * eliminating the necessity for protest, petitioner would not have had a cause of action against the defendant [respondent]

but asserts that

> Congress had the power to create a cause of action which had not existed before

and contends that such a right of action was created by Section 1014(a) of the Revenue Act of 1924. The asserted basis for this contention is, of course,

[5] Section 3226, R.S., was further amended by Section 1103(a) of the Revenue Act of 1932, ch. 209, 47 Stat. 286 (U.S.C., Sup. VI, Title 26, Sec. 1672), but Section 1103(b) of that Act provided that suits instituted prior to the effective date of the Act should not be affected by Section 1103(a).

that Section 1014(a) was intended to apply retroactively to taxes paid prior to its enactment. The respondent contends that Section 1014(a) was intended to apply prospectively only, and that it did not create any new causes of action predicated upon transactions which had been fully completed prior to its effective date.

The plain effect of the proviso added to Section 3226, R.S., by Section 1014(a) is to authorize a suit in court (apparently against either the United States or a Collector) to recover a tax illegally exacted, even though the tax was paid voluntarily. The proviso is not specifically made applicable to taxes paid prior to its enactment (cf. the Act of March 4, 1907, c. 2919, 34 Stat. 1371, 1373; *United States* v. *Hvoslef*, 237 U.S. 1, 9), and, in our opinion, it does not appear by necessary implication that the proviso was intended to be so applicable. It has been repeatedly held that a statute shall not be given a retroactive effect unless such construction is required by explicit language or by necessary implication. *Blodgett* v. *Holden*, 275 U.S. 142, 148; *United States* v. *St. Louis, S.F. & T. Ry. Co.*, 270 U.S. 1, 3; *Lewellyn* v. *Frick*, 268 U.S. 238, 251–252; *Fullerton Co.* v. *Northern Pacific*, 266 U.S. 435, 437; *Schwab* v. *Doyle*, 258 U.S. 529, 534; *Union Pacific Railroad Co.* v. *Laramie Stock Yards*, 231 U.S. 190, 199; *United States* v. *Burr*, 159 U.S. 78, 82–83; *Sohn* v. *Waterson*, 17 Wall. 596, 598–599; *United States* v. *Heth*, 3 Cranch, 398, 413. Particularly is

this true where to give a statute retroactive application would injuriously affect substantive rights or rights of action previously vested. *Winfree* v. *Northern Pacific Ry. Co.*, 227 U.S. 296, 302; *U.S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 314–315; *Chew Heong* v. *United States*, 112 U.S. 536, 539; *Twenty Per Cent Cases*, 20 Wall. 179, 187. In the last case cited, a decision frequently referred to with approval by this Court, the Court said (p. 187):

> Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, *unless the language employed expresses a contrary intention in unequivocal terms.* (Italics ours.)

The application of this rule of construction to the instant case is illustrated by *U.S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U.S. 306, *supra*. That case involved the Act of August 13, 1894, c. 280, 28 Stat. 278, which authorized a person supplying labor and materials to a Government contractor to maintain suit in the name of the United States for his own use upon the contractor's bond. The Act of February 24, 1905, c. 778, 33 Stat. 811, amended the former statute by establishing restrictions as to the district in which such action might be brought and by creating limitations as to the time before which and within which such action might be

brought. In holding that the amendatory statute was limited not only to suits begun after its effective date but also to *transactions occurring after its effective date,* this Court said (p. 314):

> The presumption is very strong that a statute was not meant to act retrospectively, *and it ought never to receive such a construction if it is susceptible of any other.* It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied. (Italics ours.)

After pointing out that the amending statute affected substantive rights, by postponing and limiting a right of action which already vested, the Court further said (p. 315):

> we are convinced that Congress did not intend that the amendment should apply to cases where the bond had already been executed, the work done, the respective rights of the parties settled, and the cause of action already in existence. If Congress had intended otherwise, we think it would have still further amended the original act *by providing in plain language that the amendment should apply to all cases,* and not be confined to the future. (Italics ours.)

The conclusion that Section 1014(a) was intended to apply only to taxes paid after its enactment is sustained, if not required, by the fact that a re-

troactive application of the statute would give rise to serious doubts as to its constitutionality. An action against a Collector to recover taxes illegally collected by him is a personal one, and in the absence of a certificate of probable cause (Section 989, R.S. as amended; U.S.C., Title 28, Sec. 842) personal execution may issue against him. *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 430; *Union Trust Co.* v. *Wardell,* 258 U.S. 537; *Smietanka* v. *Indiana Steel Co.,* 257 U.S. 1; *Sage* v. *United States,* 250 U.S. 33; *Patton* v. *Brady, Executrix,* 184 U.S. 608. Cf. *Bankers Coal Co.* v. *Burnet,* 287 U.S. 308, 311–312. It is conceded (Pet. p. 9) that prior to the amendment of Section 3226, R.S., in 1924 no cause of action existed against the respondent by reason of the facts set forth in petitioner's amended petition.[6] (See cases cited at p. 7, *supra.*) Accordingly, if the 1924 amendment be given a retroactive application its effect will be

[6]Although conceding in its petition for certiorari (p. 9) that prior to the Revenue Act of 1924 it "would not have had a cause of action against the defendant [respondent]", and in its brief on the merits (p. 10) that where "protest is a condition precedent to recovery it must be alleged and proved and that it is not an affirmative defense to be pled by the defendant", petitioner contends (Br. p. 16) that the rule "making protest a condition precedent to the recovery * * * did not go to the question of the existence of the liability." These assertions are quite inconsistent. It is now too late to contend, in effect, that protest is an affirmative defense and that recovery may be had if the Collector does not raise the defense. See *Chesebrough* v. *United States,* 192 U.S. 253, *supra.*

to impose a personal liability upon the respondent for an act which gave rise to no liability at the time thereof.[7] We think it extremely doubtful if within constitutional limitations Congress could retroactively create such a liability. See *Graham & Foster v. Goodcell*, 282 U.S. 409, 426, 429, *supra*; *Coolidge* v. *Long*, 282 U.S. 582; *Untermyer* v. *Anderson*, 276 U.S. 440; *Blodgett* v. *Holden*, 275 U.S. 142; *Nichols* v. *Coolidge*, 274 U.S. 531; *Forbes Boat Line v. Board of Commissioners*, 258 U.S. 338, 339. See also *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 407–410; *Carpenter* v. *Shaw*, 280 U.S. 363; *Choate* v. *Trapp*, 224 U.S. 665; *Barnitz* v. *Beverly*, 163 U.S. 118; *Pritchard* v. *Norton*, 106 U.S. 124, 132. In the *Graham & Foster case, supra*, this Court held that where an asserted vested right arose from the mistake of Government officers in administering the law, Congress was not prevented from curing the defect in administration merely because the effect of such action might be to destroy causes of action which might otherwise exist, but the Court specifically distinguished the situation there before the Court from "a case of an attempt retroactively

[7] In *Arthur C. Harvey Co.* v. *John F. Malley and/or Malcolm E. Nichols*, Former Collectors, No. 537, present term, decided March 13, 1933, which involved, among others, the question here presented, the Collector from whom the taxpayer sought recovery in a suit brought in 1930 had long been out of office, and the transactions for which the taxpayer insisted the Collector was liable had occurred several years prior to the 1924 amendment.

to create a liability in relation to a transaction as to which no liability had previously attached" (282 U.S. 409, 426).

It may be suggested that the respondent is an official of the Government, and that even though Congress may not retroactively impose liabilities upon persons generally, it may retroactively impose a liability upon a Collector, who is, generally speaking, reimbursed by the Government for personal liabilities incurred in the performance of official duties. (See Section 989, R.S., as amended, U.S.C., Title 28, Sec. 842; Section 3220, R.S., as amended, U.S.C., Title 26, Sec. 149.) But as this Court pointed out in the *Smietanka case,* 257 U.S. 1, 4, 5, *supra,* "A personal execution is denied only when the certificate [of probable cause] is given", and when a suit against a Collector "is begun it cannot be known with certainty that the judgment will be paid out of the Treasury."

But for the purposes of the instant case it is not necessary to seek a final, authoritative answer to the question whether Congress might constitutionally make Section 1014 of the Revenue Act of 1924 applicable to transactions completed prior to its enactment. The authorities above cited establish, in our opinion, that such an attempt would give rise to a serious constitutional question. This Court has repeatedly said that where a statute is susceptible of two constructions, the Court will adopt that construction by which serious consti-

tutional questions are avoided.[8] *Blodgett* v. *Holden*, 275 U.S. 142, 148, *supra*; *Lewellyn* v. *Frick*, 268 U.S. 238, 251, *supra*; *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 390; *Bratton* v. *Chandler*, 260 U.S. 110, 114; *Texas* v. *Eastern Texas R.R. Co.*, 258 U.S. 204, 217; *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407, 408.

The contention that Section 1014(a) was intended to apply prospectively only is not inconsistent with its legislative history. The Report of the House Committee on Ways and Means contains the following explanation of that section (House Report No. 179, 68th Cong., 1st Sess., pp. 33–34):

> The provisions of section 1318 of the existing law have been amended to provide that after the enactment of the bill it shall not be a condition precedent to the maintenance of a suit to recover taxes, sums or penalties paid, that such amounts shall have been paid under protest or duress. The fact that pro-

[8] Section 3226, R.S., as amended by Section 1014, is, of course, applicable to suits against the United States. In construing such section, this Court has pointed out that "suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued", and that Section 3226, R.S., as amended, is subject "to the rule of strict construction to be applied to waivers by the United States of its sovereign immunity from suit." *United States* v. *Michel*, 282 U.S. 656, 659, 660. This doctrine of construction would seem to be equally applicable to a suit against a Collector since clearly Congress intended that the statute should apply in the same manner with respect both to suits against the United States and suits against Collectors.

> test was made has little bearing on the question whether the tax was properly or erroneously assessed. The making of such a protest becomes a formality so far as well-advised taxpayers are concerned, and the requirement of it may operate to deny the just claim of a taxpayer who was not well informed.[9]

We think that in substance the Committee Report repeats the language of the statute and that it offers no light as to the legislative intent which may not be gleaned from the statute itself.[10] Moreover, even if the words of the Report "are broad enough in their literal extent to comprehend existing cases", nevertheless such words "must * * * be construed as applicable only to cases that might hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." *Twenty Per Cent. Cases*, 20 Wall. 179, 187, *supra*.

The petitioner places reliance upon Section 1014(b) of the Revenue Act of 1924, p. 28, *infra*, which provides that

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[9] Precisely the same statement with respect to Section 1014 [then Section 1114] is found in the Report of the Senate Committee on Finance (Senate Report No. 398, 68th Cong., 1st Sess., pp. 44–45).

[10] The only comment with respect to Section 1014 which seems to have been made at the Committee Hearings (Hearings before the Senate Committee on Finance, 68th Cong., 1st Sess., H.R. 6715, p. 52) is the following statement of A. W. Gregg, Special Assistant to the Secretary of the Treasury:

"Turning now to section 3226 of the Revised Statutes, on page 323, there is only one change and it is in lines 14, 15,

> This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

But, under the applicable rules of statutory construction, a declaration that the statute shall not affect pending court proceedings does not necessarily imply that the statute shall affect all future court proceedings wholly without regard to whether the taxes in question were paid prior to the enactment of the statute. Moreover, Section 1014(b) must be read in the light of the statute which it replaced, i.e., the second paragraph of Section 1318 of the Revenue Act of 1921, ch. 146, 42 Stat. 227, which reads as follows (p. 27, *infra*)

> This section [Section 3226, R.S., as amended] shall not affect any suit or pro-

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and 16. The result of the change is this: Under the existing law it is probable, although the courts have not finally passed upon it, that a suit for the recovery of an excessive tax paid can be maintained only if the tax was paid under protest. The result of that is that those taxpayers who are well advised and who pay every cent of their taxes under protest, as most of them do now, can sue to recover it back; but the individual taxpayer, who is not so well advised, reads the regulations, and pays his tax accordingly, cannot bring suit for recovery because of his failure to pay under protest. The matter of paying under protest has nothing to do with the merits of the case, and the Treasury recommends that it be changed."

There is nothing in this comment which indicates that the amendment was to apply to taxes paid prior to the effective date of the statute.

The applicable regulations merely repeat the language of the statute. Treasury Regulations No. 65, Art. 1351; Treasury Regulations No. 69, Art. 1351.

> ceeding instituted prior to the passage of this Act, *but shall apply to all suits and proceedings instituted after the passage of this Act,* whether or not barred by prior Acts of Congress. (Italics ours.)

It thus appears that, in Section 1014 of the 1924 Act, Congress failed to insert the provision of Section 1318 of the 1921 Act by which Section 3226, R.S., as amended, was specifically made applicable to all suits thereafter instituted.[11] This omission would seem to indicate a conscious effort on the part of Congress to limit the effect of the 1924 amendment to taxes paid thereafter.

Pursuant to the principles upon which we rely, it was held in *Warner* v. *Walsh,* 27 F. (2d) 952 (D.Conn.), that the 1924 amendment of Section 3226, R.S., was prospective only, and that it was limited not only to suits begun after its passage but also to suits begun as a result of transactions arising after its passage and to payments for taxes collected thereafter. The same result was reached in *Du Puy* v. *United States,* 67 C.Cls. 348, 381–382. See also *Rasmussen* v. *Brownfield-Canty Carpet Co.,* 31 F. (2d) 89, 92 (C.C.A. 9th); *Harrison* v. *Lewellyn,* 28 F. (2d) 990 (W.D.Pa.), aff'd, 35 F. (2d)

[11] Attention is called also to Section 1103 of the Revenue Act of 1932, ch. 209, 47 Stat. 286, which further amended Section 3226, R.S. Like Section 1318 of the 1921 Act, Section 1103(b) of the 1932 Act contained *specific provisions* making Section 3226, R.S., as amended, inapplicable to all pending suits *and applicable to all suits thereafter instituted.*

283. Cf. *Clift & Goodrich* v. *United States,* 56 F. (2d) 751, 753 (C.C.A. 2d), certiorari denied October 10, 1932, No. 162, October Term, 1932; *Winant* v. *Gardner,* 29 F. (2d) 836 (C.C.A. 2d).

On the other hand, certain courts have held or intimated that the 1924 amendment should be given a retroactive application. *Farmers Loan & Trust Co.* v. *United States,* 64 C.Cls. 516; *Beatty* v. *Heiner,* 10 F. (2d) 390, 392 (W.D.Pa.), reversed on other grounds, 17 F. (2d) 743, 276 U.S. 598. See also *Leach v. Nichols,* 42 F. (2d) 918, 921 (D.Mass.), reversed on other grounds, 50 F. (2d) 787 (C.C.A. 1st), 285 U.S. 165; *Weir* v. *McGrath,* 52 F. (2d) 201 (S.D. Ohio), affirmed without opinion, 41 F. (2d) 1021 (C.C.A. 6th); *Electric Storage Battery Co.* v. *McCaughn,* 52 F. (2d) 205 (E.D.Pa.); *Warner* v. *Walsh,* 24 F. (2d) 449 (D.Conn.). In none of these cases, except possibly *Weir* v. *McGrath,* does the question seem to have been given careful consideration, and in our opinion these decisions may not be supported. In *Warner* v. *Walsh,* 27 F. (2d) 952, *supra,* the court in a carefully considered opinion refused to follow either *Beatty* v. *Heiner, supra,* or its own earlier decision in *Warner* v. *Walsh,* 24 F. (2d) 449, *supra.* The *Farmers Loan & Trust Co. case, supra,* has been overruled by the later decision of the Court of Claims in *Du Puy* v. *United States,* 67 C.Cls. 348, 381–382, *supra.*[12]

[12] It should be noted that in the *Farmers Loan and Trust Co. case, supra,* the suit was against the United States. It

II

WHETHER THE AMENDMENT OF THE CLAIM FOR REFUND WAS VALID

The District Court sustained respondent's demurrer to the amended petition not only on the ground that the tax was paid voluntarily but also on the ground that the amended petition sought recovery of the tax on a ground which was not specified in the claim for refund (R. 13–17). The Circuit Court of Appeals did not pass on the first of these grounds but sustained the judgment of the District Court on the second ground (R. 22–27).

The petitioner here concedes that the original claim for refund was insufficient but contends that it was made sufficient by amendment prior to its rejection. Petitioner recognizes that the amendment was made after the expiration of the statutory period for filing a claim for refund, but asserts that such amendment was permissible under the decisions of this Court in *United States* v. *Factors & Finance Co.* and *United States* v. *Memphis Oil Co.*, respectively, Nos. 141 and 308, present term, decided January 9, 1933.

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is arguable that Congress might validly surrender a defense theretofore available to the Government, but for reasons above set forth it is extremely doubtful if within constitutional limitations it could retroactively impose a personal liability upon a Collector for an act which gave rise to no liability at the time of the act.

In the respondent's memorandum filed in response to the petition for certiorari, it was stated (p. 2):

> while we contend that a claim for refund based upon specific items may not be amended after the expiration of the period of limitation so as to claim different items, we believe that question is not properly presented by this record because the allegations in the complaint appear to be sufficient on demurrer, at least with respect to the items of invested capital, and that the demurrer should therefore have been overruled.

In view of this statement we think the petitioner may have assumed, in preparing its brief on the merits, that the Government intended to make no point before this Court as to the sufficiency of the claim for refund or as to the validity of the amendment of the claim for refund.[13] Further consideration of the record, however, raises doubts as to the correctness of the concession made in the respondent's memorandum, and for the protection of the Government's interest in possible further proceedings in this case and in other cases which may arise we desire briefly to set forth our views with respect to the validity of the amendment of the claim for refund.

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[13] Although petitioner seems to have argued the point, it has done so quite briefly.

The amended petition alleged that the collection of the sum of $6,874.00 as petitioner's tax for 1917 was illegal for the reason that said tax (R. 4)—

> was computed upon an incorrect income and invested capital, in that the tax was computed upon a taxable net income of $16,940.18 and an average invested capital for the year 1917 of $28,416.30

whereas

> for the taxable year 1917, the correct taxable net income is $9,546.35; the correct average invested capital is $27,823.40, and the correct tax liability is $2,322.99.

Since it thus appears on the face of the amended petition that the correct invested capital was *less* than the invested capital used by the Commissioner in computing the alleged erroneous tax, it is obvious that the amended petition does not seek, and presents no basis for, recovery of the tax on the ground of errors of the Commissioner in fixing petitioner's invested capital.[14] The amended petition would thus seem to be insufficient upon demurrer, so far as it rests upon alleged errors with respect to invested capital.

The only other basis of recovery set forth in the amended petition is alleged errors of the Commissioner with respect to the petitioner's net income.

[14] The lower the invested capital is fixed the higher is the tax. While apparently the Commissioner did make an error with respect to petitioner's invested capital, it appears on the

The original claim for refund, attached to the amended petition (R. 5–11) was filed on the last day of the four-year statutory period (R. 3). This claim contained three specific grounds or bases for refund (i.e., error with respect to the variable deduction for excess profits (R. 8–9); claim for special assessment (R. 9–10); and errors with respect to invested capital (R. 10–11))—none of which grounds are or may be now relied upon—and a general claim of errors with respect to net income [15] (R. 10–11). This general claim relied on no specific adjustments in net income but stated that an audit was being made, and that if the audit showed differences in net income it would be submitted as additional evidence (R. 11).

The general claim for refund based upon alleged errors with respect to net income was obviously insufficient because of the failure to set forth the specific adjustments relied upon. *United States* v. *Felt and Tarrant Co.*, 283 U.S. 269. It is true that subsequently the claim for refund was amended so as, we now assume, to show such specific adjustments, but the amendment was made after expiration of the statutory period for filing a claim for refund.

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face of the amended petition that this error was in petitioner's favor.

[15] For the purpose of this brief we assume that the claim for refund, properly interpreted, presents a general claim of errors with respect to net income.

The demurrer to the amended petition would thus seem to present the question whether a claim for refund containing several specific items, all of which are abandoned, and a general item may, after expiration of the statutory period for filing claim for refund, be amended so as to present an additional specific item or basis of recovery. We question whether such amendment may lawfully be made under the decisions of this Court in the *Memphis Oil Co.* and *Factors & Finance Co. cases, supra.* In both of those cases the original claim was general, specifying no particular ground, and it was held that the claim was broad enough to include a subsequent specific amendment filed by the taxpayer. But this does not mean that a claim stating one or more specific grounds may be amended to state another specific ground after the statute has expired. In *United States* v. *Henry Prentiss & Co.,* No. 234, October Term, 1932, decided January 9, 1933, this Court said:

> A declaration according to the common count for money had and received may be good though it does not tell us how the money was received or the use established. * * * This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure.

The distinction is not merely formal. When the claim originally filed is general, the Commissioner has his remedy. He may reject the claim for refund for its deficiencies in form. If he does not do so, he may well be held to have waived the defects and be required to consider any amendment, within the scope of the original claim, filed before he has rejected it. But where the original claim contains specific grounds, the Commissioner may not summarily reject it for a defect of form; there is no defect of form. He must consider the specific claims made by the taxpayer; his consideration frequently requires an investigation; and such an investigation often takes a considerable amount of time. If it be held that the taxpayer may add new grounds at any time until final action on the original claim, it is obvious that the statutory period fixed by Congress has been greatly extended. This is illustrated by the present case; for the grounds upon which the taxpayer now relies were not presented to the Commissioner until more than a year after November 5, 1927, when the four-year period fixed by Congress for the filing of claims for refund had expired.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APRIL, 1933.

APPENDIX

STATUTES INVOLVED

REVENUE ACT OF 1921, CH. 136, 42 STAT. 227, 314

SEC. 1318. That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

This section shall not affect any suit or proceeding instituted prior to the passage of this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress (U.S.C., Title 26, Sec. 156).

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; *but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.* No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U.S.C., Title 26, Sec. 156.)

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

(NOTE: Italics supplied, indicating amendment pertinent to this case.)

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